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Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JEFFREY SENECHAL,

Petitioner,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court order, in a civil action for personal injuries, compelling Defendant, Jeffrey Senechal to undergo deoxyribonucleic acid (DNA) testing violates his privacy rights under the Fourth Amendment to the United States Constitution?

II. Whether the Plaintiff, Jane Doe has failed to satisfy Mass. R. Civ. P. 35(a) requirements of "in controversy" and "good cause" thereby resulting in a violation of Defendant, Jeffrey Senechal's right to privacy pursuant to the Fourth Amendment of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts that gives rise to this petition is reported as *Doe v. Senechal*, 431 Mass. 78, 725 N.E.2d 225 (2000). It is reprinted within the Petitioner's Appendix at page 13a . The decision of the motion judge is unreported but is reprinted within the Petitioner's Appendix at page 1a.

JURISDICTION

On March 20, 2000 the Supreme Judicial Court of Massachusetts ("SJC") affirmed the decision of the motion judge to compel Jeffrey Senechal to undergo deoxyribonucleic acid (DNA) testing regarding paternity, holding that the Fourth Amendment does not apply to a civil action between private litigants. The SJC further found that Jane Doe satisfied the "in controversy" and "good cause" standard of Mass. R. Civ. P. 35(a), 365 Mass. 793 (1974) analysis. Lastly, the SJC held that in the event that the Fourth Amendment does apply to civil actions between private litigants, the DNA test ordered meets the standard of reasonableness.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Rule 35(a) of the Massachusetts Rules of Civil Procedure, 365 Mass. 793 (1974), provides:

> When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person and persons by whom it is to be made.

U.S.C.A. Const. Amend. IV-Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This matter involves personal injuries allegedly sustained by the Plaintiff, Jane Doe, as a result of an alleged sexual encounter with the Defendant, Jeffrey Senechal. At the time of the alleged incident, Ms. Doe was an in-patient at West Lake Academy, a secured treatment program operated by Health & Education Services, Inc. under contract with the Department of Mental Health. The Defendant, Jeffrey Senechal, was an employee of Health & Education Services, Inc. and West Lake Academy at the time of the alleged incident. Ms. Doe claims that as a result of sexual intercourse with Mr. Senechal, she became pregnant and had to give her baby up for adoption. The Plaintiff's Second Amended Complaint sets forth standard claims of negligence, emotional distress, violations of her State and Federal civil rights and a claim for assault and battery against Jeffrey Senechal.

Ms. Doe's allegations of an alleged sexual relationship came to light at the time of her discharge from the program on or about June 26, 1995, when she left a letter for Mr. Senechal with another counselor at West Lake. The counselor read the letter, which contained references to alleged sexual activity between Mr. Senechal and Ms. Doe. The contents of the letter were reported to the proper West Lake Academy supervisory personnel and, as a result, a "51A" report was filed with the Massachusetts Department of Social Services. The Department of Social Services subsequently dismissed the report. In addition, the Department of Mental

Health conducted its own independent investigation and found Ms. Doe's claims to be unsubstantiated.

According to the Department of Mental Health's decision letter, Ms. Doe claims that she engaged in sexual intercourse with Mr. Senechal on three separate occasions: June 16, June 18 and June 23, 1995. Each of the encounters is alleged to have taken place during a transport by Mr. Senechal of the Plaintiff to and from the bus station.[1] After a thorough investigation, the Department of Mental Health concluded that Ms. Doe and Mr. Senechal "could not have engaged in sexual relations on June 23, 1995," since, Mr. Senechal did not transport Ms. Doe to and from the bus station on that day as he was in New Hampshire on a program sponsored outing. The Department of Mental Health further concluded "that it is highly unlikely they engaged in such relations on June 16, 1995," since, considering their departure time from West Lake Academy, it appeared unlikely that Mr. Senechal and Ms. Doe would have had sufficient opportunity to pull off the road, undress, engage in the sexual acts described by Ms. Doe in her letter to Mr. Senechal, and then dress themselves and travel to Boston in time to park the car, and for Ms. Doe to purchase a ticket and board the bus on time. Lastly, the Department of Mental Health found that "given the lack of corroborating evidence, it is not possible to determine

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[1] As part of Ms. Doe's Service Plan, she was allowed to make weekend trips to Maine to visit her mother in the month prior to her discharge from West Lake Academy. To enable this, West Lake Academy arranged for staff members to drive her to a Boston bus station at the beginning of her visits and to pick her up at the station upon her return.

whether such relations occurred on June 18, 1995." As a result, the Department of Mental Health found Ms. Doe's allegations to be "unsubstantiated."

Among those interviewed by the Department of Mental Health in its investigation of the alleged incident was the Plaintiff's mother. According to the Department of Mental Health, Ms. Doe's mother told the investigator that Ms. Doe had informed her that she became pregnant from a sexual encounter on June 18, 1995 with an unknown passenger on the bus she took on that date from Maine to Boston. On that day, Mr. Senechal saw Ms. Doe give a "good bye kiss" to a man at the terminal after she had disembarked from the bus. The Department of Mental Health's decision letter references rumors circulating among West Lake residents that Ms. Doe and the man seen at the bus station had engaged in sexual relations.

Mr. Senechal denies any sexual contact between himself and Ms. Doe. He has further denied the paternity of Ms. Doe's child. To establish paternity, Ms. Doe requested that Mr. Senechal undergo deoxyribonucleic acid (DNA) testing. Mr. Senechal refused asserting that Ms. Doe had failed to establish the "in controversy" and "good cause" standard under Rule 35, and moreover, any such testing would be a violation of his Fourth Amendment right to privacy. Ms. Doe then filed a Motion to Compel Mr. Senechal to undergo such testing in the Massachusetts Superior Court. Mr. Senechal filed an Opposition to such Motion asserting his Fourth Amendment right among other arguments. Specifically, Mr. Senechal alleged that he should not be ordered

to undergo the DNA testing "as such testing is a highly invasive and intrusive procedure for which there is absolutely no precedent or support in personal injury actions like the present. Such a procedure necessarily implicates Mr. Senechal's privacy rights and protections afforded by the Fourth Amendment to the United States Constitution." (Citations omitted.)

On May 14, 1999, after a hearing, the motion judge issued a Memorandum of Decision and Order on Plaintiff's Motion to Compel a Rule 35 Examination of Jeffrey Senechal, allowing Ms. Doe's Motion and ordering Mr. Senechal to undergo a paternity test. [App. 1a]. Mr. Senechal filed a petition with a single justice of the Massachusetts Appeals Court for an interlocutory appeal, again asserting that the court order violated his Fourth Amendment rights. The single justice denied the relief requested, but granted an interlocutory appeal to the full Appeals Court. [App. 9a]. The SJC granted Ms. Doe's application for direct appellate review. Mr. Senechal continued to argue that the court ordered DNA testing resulted in a violation of his Fourth Amendment right to privacy. After briefing and a hearing upon the matter, the SJC affirmed the motion judge's ruling holding that the Fourth Amendment does not apply to civil actions between private litigants and that Jane Doe satisfied the "in controversy" and "good cause" standard of Mass. R. Civ. P.35(a), 365 Mass. 793 (1974). [App. 13a]. The SJC further held that in the event that the Fourth Amendment did apply to civil actions between private litigants, the DNA test ordered would meet the standard of reasonableness. [App. 24a].

ARGUMENT

I. THE COURT ORDER, IN A CIVIL ACTION FOR PERSONAL INJURIES, COMPELLING DEFENDANT, JEFFREY SENECHAL TO UNDERGO DEOXYRIBONUCLEIC ACID (DNA) TESTING VIOLATES HIS PRIVACY RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Fourth Amendment Applies to the Court Order Requiring Jeffrey Senechal to Undergo DNA Testing in a Civil Action Between Private Litigants.

It is a firmly established principle of law in this country that individuals retain an expectation of privacy and a right to be free from government sponsored intrusions into the integrity of their own bodies. See *Skinner v. Railway Labor Executives' Assn'n*, 489 U.S. 602, 616-618 (1989); *Schmerber v. California*, 384 U.S. 757, 767 (1966). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Supreme Court of the United States has held that the extraction of blood, as well as the taking of urine samples, constitute a search and seizure within the meaning of the Fourth

Amendment. *Schmerber, supra*; *Skinner, supra.* The Court further noted in *Schmerber* that "[t]he integrity of an individual's person is a cherished value of our society." *Schmerber* at 772. Saliva and tissue samples, of the kind involved in the testing ordered by the motion judge and affirmed by the SJC, have been likened to blood and urine samples because they can provide a significant amount of genetic identity information and are generally not items in the public domain. *United States v. Nicolosi*, 885 F. Supp. 50, 55 (D.N.Y. 1995). The *Nicolosi* Court stated the following:

> It is typically the case that a saliva sample is obtained by swabbing the inside of the subject's mouth with a pad of some sort. Such a scenario, wherein a citizen is directed to submit to intrusion into his body, is properly viewed as implicating his dignitary interests. This factor, combined with the private identifying information contained in the sample suggest that a proper compliance with the requirements of the Fourth Amendment is mandated. *Id.*

Additionally, many courts, and most recently the Supreme Judicial Court of Massachusetts, have held that obtaining and analyzing DNA is a search and seizure implicating Fourth Amendment concerns. *Landry v. Attorney General*, 429 Mass. 336, 347 (1999); see also *Rise v. State of Oregon*, 59 F.2d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302

(4th Cir. 1992); *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wisconsin 1996) (assuming that non-consensual cheek swabbing to obtain DNA material is a search under the Fourth Amendment); *Mayfield v. Dalton*, 901 F.Supp. 300, 303 (D. Hawaii 1995), *vacated and remanded to dismiss as moot*, 109 F.3d 1423 (9th Cir. 1997) (holding that the taking of DNA by means of blood samples and epithelial cells from the inside of a cheek using a cotton swab constitutes a "seizure" subject to scrutiny under the Fourth Amendment). In such cases, it is the identifying genetic information contained within the sample that implicates the subject's privacy interests.

In its decision regarding the testing of Mr. Senechal, the SJC relied upon *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) in which this Court held that "Rule 35 . . . is free of constitutional difficulty." *Id.* at 114. However, the ruling in *Schlagenhauf* was offered well before the body of law arose addressing the right to privacy pursuant to the Fourth Amendment when concerning DNA testing. In 1964, the science of DNA testing was in its infancy and certainly was not an issue addressed or contemplated in *Schlagenhauf*. The type of testing sought in *Schlagenhauf* consisted of standard mental and physical testing, including testing to be completed by doctors of internal medicine, ophthalmology, neurology and psychiatry. *Schlagenhauf* at 107. The Court never anticipated nor envisioned the extent of testing which now can be performed based upon scientific advances. Generally, the art of DNA fingerprinting was first developed in 1985, well after the privacy concerns were at issue in *Schlagenhauf*. See Andrea De Gorgey,

Note, *The Advent of DNA Databanks: Implications for Information Privacy*, 16 Am. J.L. & Med., 381, 382 n. 5 (1990).

As indicated above, DNA testing involves a significant amount of genetic identity information not in the public domain. In fact, it contains all of the information unique to the creation of an individual. Deborah F. Barfield, *DNA Fingerprinting - Justifying the Special Need for the Fourth Amendment Intrusion into the Zone of Privacy*, 6 Rich. J.L. & Tech. 27 (2000). This is the most personal and individualized type of testing which can be conducted upon a person. It is not the type of testing at issue in *Schlagenhauf* but now, through the advances of science, the testing requested has the ability to identify the very core of a human being.

B. Other Courts Have Raised the Issue of Whether the Fourth Amendment Applies to Civil Discovery Orders.

The issue of whether the Fourth Amendment applies to court orders in civil actions has been raised in various courts throughout the country. See *Bowerman v. MacDonald*, 431 Mich. 1, 19 (1988); *United States v. International Business Machs. Corp.*, 83 F.R.D. 97, 103 (S.D.N.Y. 1979); *Ambassador College v. Goetzke*, 244 Ga. 322, 325, *cert. denied*, 444 U.S. 1079 (1980). The defendant in *Bowerman* refused to take a court ordered paternity test arguing that the "blood test in a paternity case implicates the Fourth Amendment since it involves state action, which he finds in the fact that the blood test is

ordered by a court pursuant to a statute." *Bowerman, supra* at 19. The Supreme Court of Michigan believed that the Fourth Amendment would not apply, but nonetheless went on to conduct an analysis upon the issue of whether the test was reasonable. *Id.*

In *United States v. International Business Machs. Corp., supra,* the United States District Court for the District of Southern New York dealt with the issue of whether a subpoena issued in a civil action, where the state is a party, would implicate the Fourth Amendment. The Court acknowledged the same type of argument brought forth in the instant action that "[t]he requisite state action component of a fourth amendment claim in all civil cases, whether the government appears or not, would be the court's involvement in issuing and enforcing the subpoena." *Id.* at 102. The Court went on to state that it did not believe the Fourth Amendment would apply, but again applied the test for reasonableness to the facts at hand to determine if the subpoena would pass a Fourth Amendment analysis.

In a concurring opinion in *Ambassador College v. Goetzke, supra,* the Supreme Court of Georgia raised an almost identical issue as the questions presented by Mr. Senechal in the instant action. Although not dispositive in that case, Justice Hill raised the question of whether

> [I]n a proper case we should consider the question of whether the powers of the state (i.e., the civil practice rules relating to discovery) are being used by civil litigants pursuing unsubstanti-

> ated claims in violation of the right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, and whether the probable cause requirements of the fourth amendment relating to search warrant is applicable to civil discovery procedure and orders. *Id.*

Certainly, this is an issue that has been raised and addressed by other Courts throughout the United States with no answer as to the application of the Fourth Amendment to civil discovery orders. Therefore, it is a question that should be addressed by this Court for a final resolution of the issue.

C. The Court Ordered DNA Test Does Not Meet the Standard of Reasonableness.

As the SJC recognized, in order to satisfy the requirements of the Fourth Amendment, searches and seizures must "meet the standard of reasonableness." [App. 24a]. "[T]he ultimate determination of a search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate government interest." *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D. N.J. 1986) and cases cited; see also *Skinner, supra* at 619.[2] The degree of intrusion

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[2] In most criminal cases, the balance is stricken in favor of the procedures described by the Warrant Clause of the Fourth

caused by any search must be viewed in the context of the individual's legitimate expectation of privacy. *Capua* at 1514. Generally, "[a]s measured by the expectation of privacy, inspections of personal effects are generally least intrusive, while breaches of the 'integrity of the body' result in the greatest invasion of privacy." *Guiney v. Roache*, 686 F. Supp. 956, 960 (D. Mass. 1988), quoting *Capua* at 1514. Moreover, there are two types of seizures occurring in the instant case. Mr. Senechal must undergo the actual intrusion into his bodily integrity to obtain the sample, then the sample itself, still a part of Mr. Senechal as it is his genetic marker, is taken and subjected to additional testing. See *Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). The very fingerprint of Mr. Senechal's being is removed and tested. The allowance of such intrusions must be outweighed by a governmental interest.

The SJC, in determining that the court order met the standard of reasonableness, failed to identify a single legitimate government interest. Instead, the SJC stated that "the 'reasonable expectation is that the test results will strongly point to, but not conclusively prove' the pregnancy." (citation omitted)

Amendment. *Skinner, supra* at 619. "Except in certain well-defined circumstances, a search and seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id.* The Supreme Court has recognized exceptions to this rule, however, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.* When faced with such special needs, the Court has adopted a balancing approach, weighing the governmental and privacy interests at stake. *Id.* It is this balancing approach which the Motion Judge applied below and on which the Defendant focuses his argument.

[App. 24a]. However, whether Ms. Doe is assisted in her claims does not promote a legitimate government issue and therefore, such assistance should be trumped by Mr. Senechal's constitutional right to an expectation of privacy. Moreover, the SJC has admitted that the paternity testing will not conclusively prove the pregnancy. To allow such testing, even though it will not be dispositive of the final issue would not meet the standard of reasonableness.

The present case is not a paternity action where the government has an interest, as expressed in statute, in ensuring that children born out of wedlock enjoy rights equal to the rights enjoyed by children whose parents were married at the time of their birth. See M.G.L. c. 209C, Section 1. Nor is this an action in which the government is a party, as in a criminal case where a legitimate State interest in solving and prosecuting crimes clearly exists. Instead, this is a purely private dispute for monetary damages in which the government does not have any legitimate interest, much less an interest that would override the Defendant's privacy rights.

Moreover, it is critical to the above analysis that the Defendant, Jeffrey Senechal, is a "free" civil litigant and does not belong to any group that courts have recognized as possessing diminished privacy rights. Mr. Senechal is not a convicted person or a public employee engaged in a safety-sensitive task, the groups most commonly recognized as having diminished privacy rights. See *Landry*, *supra* at 344 ("...convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity."); See also *Skinner*, *supra* at 627

("...expectations of privacy of [railroad] employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety..."). Mr. Senechal, therefore, has a greater expectation of privacy in his DNA than is accorded such convicted persons or public employees engaged in safety-sensitive tasks.

For example, courts which have upheld against Fourth Amendment attack the obtaining and analyzing of DNA from convicted persons as part of a statutory scheme to maintain a DNA database for purposes of resolving past and future crimes, have explicitly relied on the convicted person's diminished privacy rights. *Landry*, *supra* at 344; *Jones*, *supra* at 306 ("...when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."). As the Court in *Rise* explained:

> [Convicted] persons do not have the same expectations of privacy in their identifying genetic information that "free persons" have. Once a person is convicted ... his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling. *Rise*, *supra* at 1560.

It is the convicted person's diminished privacy rights, combined with the government's compelling interest in the investigation and prosecution of un-

solved and future criminal acts, which has justified the search and seizure of the person in each such case by means of obtaining a DNA sample.

In contrast, there is no such diminished privacy right with respect to a "free" person or civil litigant. As is implicit in the above decisions, a "free" person has a far greater expectation of privacy in his or her bodily integrity and identifying genetic information.

Clearly, in the context of the present personal injury action to which the Defendant was made an unwilling party, the buccal swab test at issue, requiring the scraping of tissue from Mr. Senechal's inner cheek, is an invasive procedure which must be judged against the government's interest, if any, in obtaining his bodily fluids for purposes of DNA analysis. Mr. Senechal certainly has an expectation of privacy in his bodily integrity and very private identifying genetic information, which is not outweighed by any legitimate government interest. The "integrity of the truth seeking process," as the Motion Judge characterized the government interest at issue, while certainly a desirable state of affairs, is too abstract to qualify as the type of legitimate State interest needed for a Fourth Amendment balancing of interests and was not adopted by the SJC. [App. 7a]. Any individual's right to privacy would always be trumped by such an all-encompassing standard. What the Motion Judge has envisaged is akin to saying that the legitimate State interest which justifies searches and seizures in criminal cases is our desire to live in a crime-free society. Measured against that amorphous standard, no individual right could be thought to be more weighty. In addition, a civil litigant, such as the Plaintiff here, has

other means available to her to challenge the Defendant's credibility, means which would exist whether or not she had conceived a child. A constitutionally infirm means of accomplishing the same thing ought not to be sanctioned just because it may appear to be expedient.

II. THE PLAINTIFF, JANE DOE HAS FAILED TO SATISFY MASS. R. CIV. P. 35(A) REQUIREMENTS OF "IN CONTROVERSY" AND "GOOD CAUSE" THEREBY RESULTING IN A VIOLATION OF DEFENDANT, JEFFREY SENECHAL'S RIGHT TO PRIVACY PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Assuming arguendo that the Fourth Amendment is not implicated in Rule 35 examinations, if the requirements of Rule 35 are not adequately satisfied any testing order under the faulty analysis would certainly trigger a Fourth Amendment violation.

Therefore, this Court should review the analysis and conclusions of the SJC in holding that Ms. Doe has satisfied such requirements to ensure that Mr. Senechal's Fourth Amendment rights are protected.

Mass. R. Civ. P. 35, which tracks Federal Rule of Civil Procedure 35, "requires discriminating application by the [Motion] judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy'

and 'good cause', which requirements . . . are necessarily related." *Schlagenhauf, supra* at 118-119. As this Court emphasized in *Schlagenhauf*, the "in controversy" and "good cause" requirements of Rule 35 "are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* at 118.

The record below plainly shows that the Plaintiff, as the moving party, failed to make the proper showing to support the involuntary paternity testing of a Defendant in a purely private civil lawsuit for money damages. As the SJC recognized, but failed to apply correctly to the facts of this case, "[t]he condition sought to be placed in controversy must bear directly on a determination of the merits of an issue and not a collateral matter." [App. 18a, citing to *State Ex Rel. C.S. v. Dowd*, 923 S.W. 2d 444, 448 (Mo. App. E.D. 1996)]. Specifically, the court in *Dowd* stated that ". . . for a condition to be in controversy, the condition must bear directly on the proof of the elements of a cause of action or defense." *Dowd* at 447-448. See also *Gasparino v. Murphy*, 352 So. 2d 933, 935 (Fla. App. 1977) (stating "in controversy" means the condition must be "directly involved in some material element of the cause of action or defense"). It is not enough that the elements of a claim or defense could be better proved by evidence of a party's physical or mental condition. *Bennett v. White Laboratories, Inc.*, 841 F. Supp. 1155, 1157 (M.D. Fla. 1993).

In *Dowd*, a case factually similar to the present case, the plaintiff brought a battery claim against the defendant alleging that the defendant had non-consensual sexual intercourse with her when she was a patient undergoing treatment for depression. *Dowd* at 446. The plaintiff in *Dowd* stated in Answers to Interrogatories that the defendant was not circumcised, while the defendant, in his own Answers to Interrogatories, stated that he had been circumcised. *Id.* The plaintiff subsequently filed a motion for an order requesting the defendant to submit to a physical examination pursuant to Rule 60.01(a), the local counterpart to Fed. R. Civ. P. 35, to determine whether the defendant was, in fact, circumcised. *Id.* Although the trial court granted the plaintiff's motion, the Court of Appeals of Missouri reversed, holding that the defendant's condition, i.e., whether he was circumcised, was not "in controversy" within the meaning of Rule 35 because the results of the desired examination would not go to prove an element of the plaintiff's battery claim, but rather, would only bear upon the credibility of either party:

> The underlying cause of action is battery. A battery occurs when there is an intended, offensive, bodily contact with another. *Martin v. Yeoham*, 419 S.W. 2d 937 (Mo. App. 1967); *Adler v. Ewing*, 347 S.W. 2d 396 (Mo. App. 1961). The objective elements of battery will not be proved by the results of the requested physical examination. Even if a physical examination dis-

> closed that [defendant] was not circumcised, this fact would not prove any of the elements of battery: that [defendant] had intentional, offensive, bodily contact with [plaintiff]. Conversely, [defendant's] averment that he was circumcised does not directly absolve him of liability. The elements of battery could be proved even if [plaintiff] was mistaken about one of her observations of [defendant's] physical appearance. The question of circumcision does not therefore directly relate to the proof or defense of the tort of battery.
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> . . .
>
> In this case, the issue of [defendant's] circumcision is a credibility issue. Examination results could be used to bolster or damage either party's credibility but would not resolve the true issues of the case: whether [defendant] committed a battery. The issue of whether [defendant] is circumcised is collateral and not 'in controversy' as that term is used in Rule [35]. *Dowd* at 449.

Similarly, in the present case, the question of paternity does not directly relate to the proof or defense of the Plaintiff's claims of assault and battery, negligence, emotional distress and violation of her

civil rights. None of the Plaintiff's tort claims against the Defendant, and especially her claim for assault and battery, can be proved by the results of the desired paternity testing. Results of paternity testing are not, themselves, evidence of intercourse. *Commonwealth v. Beausoleil*, 397 Mass. 206, 220 (1986). Thus, even a positive test result would not prove that the Plaintiff and Defendant had sexual intercourse, much less non-consensual sexual intercourse, which is the Plaintiff's present claim. Nor would a negative result preclude liability against Mr. Senechal, since the elements of each of the Plaintiff's tort claims, which are based on an alleged sexual assault, do not depend upon proof of paternity. Like the issue of circumcision in *Dowd*, the issue of paternity in this case is solely a credibility issue. Such an application of Rule 35, no matter how tempting, or "practical" in the view of the Motion Judge, is impermissible because paternity is not "in controversy." The Plaintiff must resort to traditional means to seek to attack the Defendant's credibility or to seek to bolster her own. Rule 35 is not a tool to obtain evidence bearing solely on the credibility of witnesses.

In another case similar to the instant action, the Family Court of New York denied the Plaintiff's request to compel the Defendant to undergo paternity testing in a sexual abuse case. *In the Matter of Ivette D.*, 460 N.Y.S.2d 718 (1983). The Court reasoned that the question of paternity is not material to the "in controversy" standard as it is "not required to prove what is at issue in the proceeding — that is, sexual abuse of the child and, further that an exclusion of paternity could not free the respon-

dent from meeting the issue of alleged repeated sexual intercourse with the child." *Id.* at 721. The Court recognized the futility of the exercise if it did not show paternity as it would neither bolster nor undermine the plaintiff's claims of sexual abuse.

The United States Supreme Court in *Schlagenhauf* warned against such improper application of Rule 35 in the context of an automobile accident case:

> The "good cause" and "in controversy" requirements of Rule 35 make it very apparent that sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged . . . to hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result. *Schlagenhauf* at 121-122.

In keeping with *Schlagenhauf*, the Defendant, simply by denying unlawful intercourse with the Plaintiff and of fathering her child, has not placed his physical condition into controversy as contemplated under Rule 35. Rather, it is the Plaintiff who has done so by uncorroborated and self-

contradicted accusations. This is not a sufficient premise upon which a Rule 35 examination can be based. Instead, the Plaintiff should be required to submit additional support instead of her own contradictory statements. Prior to her filing her Motion to Compel, the Plaintiff failed to provide relevant medical records from the facility from which she received prenatal care and where she ultimately gave birth. Therefore, the record is devoid of any supporting documentation of the possible date of conception. Such documentation would have been much less intrusive to obtain, then an intrusion into Mr. Senechal's being, to assist the Plaintiff in her claims and to support her argument under Rule 35. Until the Plaintiff could provide corroborating evidence through the medical records, the lower courts should have denied the Plaintiff's request for DNA testing. Moreover, such evidence contained within the medical records would be objective evidence in evaluating her claim, which is exactly what the SJC was striving for when it required Senechal to undergo the testing. Why allow an intrusive procedure, one that implicates the Fourth Amendment, when a review of the medical records may ultimately result in a conclusion based upon the date of conception.

As in *Schlagenhauf*, a ruling in the Plaintiff's favor in this instance would sanction paternity testing in every personal injury action based upon an alleged sexual assault whereby a child was produced. Compare *Acosta v. Tenneco Oil Company*, 913 F.2d 205, 209 (5th Cir. 1990) (declining to enter a ruling in favor of a mental examination because such would sanction a mental examination in every age

discrimination case); *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (N.D. Fla. 1988) (ruling in favor of a mental examination would endorse mental examinations in every Title VII hostile work environment sexual harassment case). Such a ruling would certainly set a very dangerous precedent and would render meaningless the express limitations of Rule 35.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
CIVIL ACTION
NO. 97-2187-C

JANE DOE

vs.

WEST LAKE ACADEMY and others[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO COMPEL A RULE 35 EXAMINATION OF DEFENDANT JEFFREY SENECHAL

INTRODUCTION

Plaintiff Jane Doe ("Doe") brought various claims against the defendants, among them, a claim of assault and battery against defendant Jeffrey Senechal ("Senechal"), arising from alleged sexual contact between the Senechal and the plaintiff. Plaintiff now asks the Court to order a buccal swab paternity test of Senechal, at the expense of defendant Health & Education Services, Inc., pursuant to Mass. R. Civ. P. 35.

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[1] Health & Education Services, Inc., Jeffrey Senechal, Robert Johnston, Donald Mosher and Ed Hovestadt.

BACKGROUND

Doe, a ward of the State of Maine, was committed to Westlake Academy ("Westlake"), a secure intensive residential treatment program for mentally ill adolescents run by Health & Education Services, Inc. ("HES") under contract with the Massachusetts Department of Mental Health. Doe attended the Westlake program for approximately twenty-one months. During her last month at Westlake, Doe was allowed to make weekend visits home. Senechal, at the time an HES staff person, transported Doe to the bus station for these visits, with no other persons present. Doe alleges that Senechal engaged in sexual activity with her during these trips. After Doe's transfer from Westlake, Doe learned that she was pregnant, and she later gave birth to a child. Senechal does not acknowledge paternity of the child and refuses to undergo a paternity test (Plaintiff's Ex. 3). Doe testified at deposition that Senechal was the father of her child, because he was the only person with whom she was sexually involved at the time she could have become pregnant (Deposition excerpt,p.225, delivered to the Court during argument). A memorandum prepared by the Assistant Commissioner of the Department of Mental Health notes that Doe told her mother that another man is the father of her child, but Doe denied to a Department investigator that she had sexual relations with this other man (Defendant's Ex. B, at 3).

DISCUSSION

Pursuant to Mass. R. Civ. P. 35, the court may order a party to submit to a physical or mental examination "when the mental or physical condition (including the blood group) of a party ... is in controversy" and the movant has shown "good cause". The moving party, Doe, contends that the paternity test will expedite a resolution of the case because if the result is positive, Senechal's liability will be established. The paternity test sought is a buccal swab, which Doe describes as a scraping of the inner cheek that is neither invasive nor uncomfortable.

Senechal opposes the motion as beyond this Court's power pursuant to Mass. R. Civ. P. 35 and a violation of the Fourth Amendment. As to Mass. R. Civ. P. 35, he argues that the Commonwealth has not recognized its application to compel a personal injury action defendant to submit to paternity testing. He further argues that the test would lead only to immaterial and irrelevant information. With regard to the Fourth Amendment, Senechal argues there is no justification nor case precedent in the context of a personal injury action for what he characterizes as a highly invasive and intrusive test.

II. Rule 35

Mass. R. Civ. P. 35 tracks the Fed. R. Civ. P. 35, as amended. See Reporter's Notes to Mass. R. Civ. P. 35 (1973). The United States Supreme Court has ruled that to support a Fed. R. Civ. P.

35 order, the movant must satisfy "in controversy" and "good cause" requirements. Schlagenhauf v. Holder, 379 U.S. 120, 85 S.Ct. 234, 243 (1964). A condition for which an examination is sought may be placed "in controversy" in two ways: by the nature of the claim or defense in the pleadings, or by an affirmative showing that the condition is in controversy. Id. Some authorities have read Schlagenhauf as permitting one party to place the condition of another party in controversy. See Pearson v. Norfolk-Southern Ry. Co., Inc., 178 F.R.D. 580, 581 (M.D.Ala. 1998)(The mental or physical condition of the person may be placed in issue by another party); Williams v. Sanderson, 904 S.W.2d 212, 215 (Tex.Ct.App. 1995)(Plaintiff may affirmatively show that the defendant's condition is in controversy); 8A Wright, Miller & Marcus, Federal Practice and Procedure, § 2234.1 (1994). But see Grober v. Dept. of Revenue, 956 P.2d at 1234 (Paternity test of defendant denied where defendant placed his condition in controversy through an affirmative defense). The condition sought to be placed in controversy must bear directly on a determination of the merits of an issue and not a collateral matter. State ex rel. C.S. v. Dowd, 923 S.W.2d 444, 448 (Mo.App.E.D. 1996).

The movant for a Rule 35 examination must also establish good cause for the request. "Whether good cause is established depends on relevance and need." Pearson v. Norfolk-Southern Ry. Co, Inc., 178 F.R.D. at 582. In determining need, the court must evaluate the movant's ability

to obtain the information sought by other means. Schlagenhauf v. Holder, 85 S.Ct. at 243.

In the instant case, Senechal challenges the relevance of a paternity test where paternity is not at issue, and where by case law, the test results alone cannot establish conclusively paternity nor the occurrence of sexual intercourse. As to irrelevance, Senechal cites a New York case involving alleged sexual abuse in which the court held that a blood test to establish probable paternity was immaterial because proof of paternity was not required to prove sexual abuse and, in any event, was unnecessary because the subject child could testify at trial. In Re Ivette D., 460 N.Y.S.2d 718, 721 (Fam.Ct.KingsCo.1983). As to the probative value of a paternity test, Senechal cites a Massachusetts decision holding that blood tests for paternity are not conclusive of paternity and do not constitute evidence of intercourse. Commonwealth v. Beausoleil, 397 Mass. 206, 220 (1986).

This court finds that the plaintiff has met her burden of affirmatively placing in controversy the defendant's condition as father of her child by way of her deposition. The deposition specifically asserts that Senechal engaged in sexual intercourse with the plaintiff and identifies him as the only possible father of her child.[2] Contrast R.R.K.

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[2] The Court is aware that the plaintiff is reported to have told her mother that another man, "the man on the bus", was the father of her child, and yet allegedly told an investigator she did not have sexual relations with this man. It is not necessary that the movant prove her case on the merits in order to meet the requirements for a Rule 35 examination. Schlagenhauf 85 S.Ct. at 243.

v. S.G.P., 400 Mass. 12, 19 (1987)(Liacos, J., concurring)(Motion judge's order of blood test to determine defendant's paternity improper where supported only by plaintiff's unsworn, unverified complaint). While it is correct that a paternity test does not respond precisely to the claim of assault and battery, the results of such a test certainly would go far in determining Senechal's liability and cannot be considered as collateral in nature. In combination with the plaintiff's testimony, a positive test result would tend to support the defendant's liability, although a negative result would not preclude liability. But see State ex rel. C.S. v. Dowd, 923 S.W.2d at 449 (Physical exam to determine if defendant was uncircumcised, as plaintiff alleged, not ordered in battery claim for non-consensual sex, because exam results would go only to credibility and not resolve the issue of whether defendant committed battery). The plaintiff has also shown good cause for the examination, because without the evidence relative to paternity there is no objective basis by which to evaluate her claim.

II Fourth Amendment

With respect to Senechal's Fourth Amendment claim, the court is uncertain where to begin its analysis. It is not altogether clear that the plaintiff's request for testing implicates the Fourth Amendment at all. However, the court will assume that judicial enforcement of a request for testing does constitutes "state action" sufficient to invoke Fourth Amendment protections. In order

to satisfy the Fourth Amendment, a test which includes the taking of bodily fluids (or tissues) must be "reasonable". Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, ___ 109, S.Ct. 1402, 1414 (1989). A particular search is reasonable where its promotion of legitimate government interests outweighs its intrusion on the individual's privacy interests. Neither the existence of "probable cause" nor "individualized suspicion" is an absolute prerequisite to the conclusion that a search is "reasonable" within the meaning of the Fourth Amendment. Skinner at 1417.

In any event, here the deposition testimony of the plaintiff establishes probable cause to believe that the requested sample will produce a positive result. She states that she has had a child and that the defendant was the only person with whom she had intercourse during the period when the child was conceived. A positive result will significantly aid the truth-seeking process by providing strong confirmatory evidence of the plaintiff's claim. Indeed, even a negative result will aid the truth-seeking process, because, although not ruling out the claim altogether, it will significantly undermine the plaintiff s credibility. The government has a strong interest in ensuring the integrity of the truth-seeking process in its courts. The intrusion of the buccal swab test upon the physical integrity of Senechal is minimal. The court concludes that, on balance, the request for testing is "reasonable," and an order for testing comports with the Fourth Amendment. See generally Grober v. Department of Revenue,

956 B2nd, 1230, 1234, n. (Alaska, 1998) (Properly executed civil discovery will generally comport with the "reasonableness" requirements of the Fourth Amendment).

The court notes that, even if Senechal possessed a Fourth Amendment right, to refuse the requested testing, the fact of his refusal likely would be admissible at trial, and the jury would be permitted to draw a negative influence against him from such evidence. Compare Quintal v. Commissioner of the Department of Employment and Training, 418 Mass. 855, 861 (1994). (Where party in civil litigation invokes Fifth Amendment right against self-incrimination, the fact-finder may draw inferences against him).

ORDER

For the foregoing reasons, the Court ALLOWS the plaintiff s motion to compel a buccal swab paternity test of defendant Senechal. Plaintiff shall bear the expense of testing.

/s/
Howard J. Whitehead
Justice of the Superior Court

Dated: May 14, 1999

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

A.C. 99-J-359
(Essex Superior Court
Civil #: 97-02187

JANE DOE

vs.

JEFFREY SENECHAL and others[1]

ORDER

The defendant Senechal filed the within petition pursuant to G.L.c. 231, §118, para. 1 requesting interlocutory review of a trial court order entered May 14, 1999. The petition is denied. However, because the issue appears to be one of first impression in the Commonwealth, I will permit an interlocutory appeal to be taken from the judges May 14, 1999 order allowing the plaintiff's Motion for an Examination (buccal swab paternity test) under M.R.C.P. 35. The trial court proceedings shall be stayed pending disposition of this interlocutory appeal.

The defendant is to file his notice of appeal forthwith. Said appeal is entered on the docket

[1] West Lake Academy, Health & Education Services, Inc., Robert Johnston, Donald Mosher and Ed Hovestadt.

without the need of assembly of the record or payment of a fee. The Appeals Court docket number assigned to this appeal is 99-P-1111 and the appellant's brief shall be due on or before August 3, 1999. The appellee's brief is due on or before September 2, 1999. No enlargements shall be allowed. This matter shall be scheduled for oral argument in October, 1999 on a date yet to be determined.

By the Court, (Lenk, J.)

/s/ Chris Micchia

Assistant Clerk

Entered: June 24, 1999

APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617) 557-1020

H. Charles Hambelton, Esquire
Gibson & Behman
One Mountain Road
Burlington, MA 01803

RE: Docket No. SJC-08110
JANE DOE
vs.
JEFFREY SENECHAL & others

NOTICE OF DOCKET ENTRY

Please take note that on March 20, 2000, the following entry was made on the docket of the above-referenced case:

RESCRIPT (Full Opinion): Judgment affirmed. (By the Court) Reasons as on file. Notice to counsel.

Susan Mellen, Clerk

Dated: March 20, 2000

To: Jocelyn M. Sedney, Esquire
Deidre Brennan-Regan, Esquire
Wendy J. Murphy, Esquire
Daniel P. Gibson, Esquire
H. Charles Hambelton, Esquire
Kimberly M. McCann, Esquire
Essex Superior Court

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

AT BOSTON, March 20, 2000

IN THE CASE NO. SJC-08110

JANE DOE

vs.

JEFFREY SENECHAL

pending in the Superior Court Department of the Trial

Court for the County of Essex, No. 97-02187

ORDERED, that the following entry be made in the docket; viz., --

Judgment affirmed.

BY THE COURT,

/s/ Lena M. Wong, Asst. CLERK.

March 20, 2000

APPENDIX E

SJC-08110

JANE DOE vs. JEFFREY SENECHAL.

Essex. January 7, 2000. - March 20, 2000.

Present: Marshall, C.J., Abrams, Lynch, Greaney, Ireland, Spina, & Cowin, JJ.

Rules of Civil Procedure. Practice, Criminal, Discovery. Paternity. Evidence, Paternity, Scientific test, Relevancy and materiality. Constitutional Law, Privacy, Search and seizure.

Civil action commenced in the Superior Court Department on November 14, 1997.

A motion to compel a physical examination of the defendant was heard by Howard J. Whitehead, J.

The Supreme Judicial Court granted an application for direct appellate review.

H. Charles Hambelton (Kimberly M. McCann with him) for the defendant.
Jocelyn M. Sedney for the plaintiff.

MARSHALL, C.J. We consider in this case a challenge to an order entered by a judge in the Superior Court pursuant to Mass.R. Civ. P. 35 (a),

365 Mass. 793 (1974),[1] that the defendant[2] undergo a physical examination to determine paternity. The case concerns allegations by the plaintiff, Jane Doe, that Jeffrey Senechal, a staff person, engaged in sexual conduct with her while she was a court-committed patient at an intensive residential treatment facility for mentally ill adolescents, Westlake Academy (Westlake) . Doe became pregnant and gave birth to a child. She has brought various claims against the owner of the facility and various other employees arising from Senechal's alleged tortious sexual contact with her.[3] Senechal has denied any sexual contact with Doe, and denies paternity of the child.

In January, 1999, Doe moved, pursuant to rule 35, for an order requiring Senechal to undergo a

---

[1] Rule 35 (a) of the Massachusetts Rules of Civil Procedure, 365 Mass. 793 (1974), provides:

> "When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person and persons by whom it is to be made."

[2] Other defendants are not parties in this appeal.

[3] Doe seeks recovery for claims of assault and battery against Senechal, as well as claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and violation of her State and Federal civil rights against all of the defendants.

buccal swab paternity test.[4] Senechal opposed the motion on two grounds. First, he claimed that any paternity testing would violate his privacy rights under the Fourth Amendment to the United States Constitution. Second, he argued that his condition as the putative father of the child was not "material" to the case and the test could not be ordered pursuant to rule 35. A judge in the Superior Court disagreed, and ordered Senechal to undergo the paternity test.

Senechal filed a petition before a single justice in the Appeals Court, pursuant to G. L. c. 231, § 118, seeking interlocutory review of and relief from that order. The single justice denied the relief, but permitted Senechal to take an interlocutory appeal. We granted Doe's application for direct appellate review. We now affirm the Superior Court order.

1. Facts. Doe was committed to Westlake, a secure intensive residential treatment facility for mentally ill adolescents operated by Health & Education Services, Inc. (HES), under a contract with the Department of Mental Health (department). Doe had been the victim of severe sexual and physical abuse. She was committed to Westlake for approximately twenty-one months, beginning in February, 1993. During her last month at the facility she was permitted to leave periodically for weekend visits with her parents in

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[4] A buccal swab paternity test involves the rubbing of a swab on the interior surface of the cheek to obtain cells that are then evaluated, using PCR (polymerase chain reaction) for deoxyribonucleic acid (DNA) analysis.

Maine. Senechal, an employee of HES, drove Doe to the bus station[5] Doe alleges that in the course of escorting her to the bus station Senechal engaged in various sexual activities with her, including intercourse. After Doe was transferred from Westlake to a less secure facility in Maine, she learned she was pregnant. Doe identified Senechal as the father. She testified at deposition that he was the only person with whom she had sexual intercourse during the relevant time period.[6]

On discovering that Doe was pregnant, the Maine Department of Mental Health reported the matter to the department, which investigated the case, focusing on the circumstances surrounding three specific dates on which Doe alleged she had sexual intercourse with Senechal. The department concluded that it was not possible that any sexual contact had occurred on one such date, and it was unlikely that sexual intercourse occurred on a second. However, for one date, June 18, 1995, the department determined that Senechal had been alone with Doe, but that, because there were no records available from Westlake concerning the length of time they were alone to-

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[5] In programs operated by or under contract with the department, single-person escorts are discouraged for the safety of both residents and staff, and to prevent false allegations with respect to or by either.

[6] The child has been adopted by a third party. According to Doe's appellate counsel, the child's adoptive parents are willing to make the child available for purposes of testing to establish paternity.

gether, the department could not determine beyond a "reasonable doubt" whether sexual intercourse could have occurred.[7] The department could not, therefore, substantiate the allegation. It nevertheless recommended that it would be "prudent" for Senechal to agree to take part in a paternity test to determine whether he is the father of the child. Senechal refused.

2. Mass. R. Civ. P. 35. Senechal first argues that the judge in the Superior Court abused his discretion by ordering a physical examination under rule 35. That rule permits a judge to order any party to submit to a physical examination by a physician only if his physical condition is "in controversy" and if the moving party has established "good cause" for the test to proceed. See note 1, supra. Senechal claims that neither prerequisite is met in this case because the question of paternity does not bear directly on the proof of any of the elements of Doe's several causes of action. Doe responds that her sexual contact with Senechal bears directly on her claim of assault and battery against him, as well as on her various claims for damages.

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[7] June 18, 1995, according to the department's report, was "within reason" as a conception date of Doe's child. Senechal argues here that the date of conception cannot be determined with certainty because Doe has not produced certain records in response to his discovery requests. Senechal did not raise this issue in the Superior Court and we therefore do not address it. See Oro-frio v. Department of Mental Health, 408 Mass. 605, 612613 (1990), S.C., 411 Mass. 657 (1992).

Parties to a civil action generally "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mass. R. Civ. P. 26 (b) (1), 365 Mass. 772 (1974). Rule 35 (a) by its express terms is more restrictive, requiring a greater showing of need: in every case where a party requests a mental or physical examination, a judge "must decide, as an initial matter" whether the party "has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" Schlagenhauf. v. Holder, 379 U.S. 104, 118-119 (1964) (discussing Federal counterpart to rule 35).[8] In addition, the requirements of rule 35 are not met "by mere conclusory allegations of the pleadings -- nor by mere relevance to the case -- but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Id. at 118. See State ex rel. C.S. v. Dowd, 923 S.W.2d 444, 447-448 (Mo. Ct. App. 1996).

A matter may be placed "in controversy" in a civil action by the nature of the claim or defense;

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[8] The language of rule 35 (a) tracks the corresponding Federal rule. Reporters' Notes to Mass. R. Civ. P. 35, Mass. Ann. Laws, Civil Procedure at 26 (Lexis 1997). In construing our rules of civil procedure, we are guided by judicial interpretations of the cognate Federal rule "absent compelling reasons to the contrary or significant differences in content." Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 414 (1998), quoting Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975).

for example, a plaintiff in a negligence action who asserts mental or physical injury, or a defendant who asserts his mental or physical condition as a defense to a claim, such as an insanity defense to a divorce action. See Schlagenhauf v. Holder, supra at 119, and cases cited. Here, Senechal claims he did not assert his physical "condition," paternity, in support of his defense; rather his condition was placed in issue by Doe. In such circumstances, Doe is required to make an "affirmative showing" that Senechalls physical condition is in controversy and that there was good cause for the examination requested.[9] Id. at 119-120.

The motion judge correctly concluded that Doe made the necessary showing that Senechal's condition as the putative father of her child was "in controversy." Doe has alleged that Senechal engaged in tortious sexual conduct with her, including a claim of assault and battery against him,

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[9] The Supreme Court of the United States in Schlagenhauf v. Holden, 379 U.S. 104, 119 (1964), provides further guidance on this point:

> "This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the [trial] judge can fulfill his function mandated by the Rule."

which he has denied. If Doe were to demonstrate through reliable evidence that Senechal is the father of a child conceived while she was under his supervision, she would prove, at least, that an intentional touching had taken place, one element of that claim. See id. at 118-119 (matter is "in controversy" if it relates directly to the proof or defense of the underlying cause of action). Cf. State ex rel, C.S. v. Dowd, supra, and cases cited.[10] Doe has also made an affirmative showing that Senechal had the opportunity to engage in sexual intercourse with her: they were alone on at least one occasion during the relevant period, June 18, 1995, when Senechal drove her to the bus station. That date, the most likely date of any sexual activity between them, corresponds with an approximate date of conception of Doe's child. At her deposition, Doe identified Senechal as the only possible father of her child. Her testimony directly counters Senechal's denial of any sexual activity between them, as well as his denial of paternity. As the motion judge correctly observed, while a paternity test cannot substantiate completely Doe's claim of assault and battery,

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[10] In State ex rel, C.S. v. Dowd, 923 S.W.2d 444, 449 (Mo. Ct. App. 1996), the court held that a physical examination to determine whether a defendant had been circumcised was not "in controversy" in a battery case. The court reasoned that "[e]ven if a physical examination disclosed that (the defendant in underlying action] was not circumcised, this fact would not prove any of the elements of battery: that [he] had intentional, offensive bodily contact with [the plaintiff in underlying action]." Id.

the results of such a test cannot be viewed as collateral.

The issue of Senechal's paternity also bears substantially on Doe's claims for damages for the resulting physical injury from the alleged improper sexual contact, her pregnancy, and any emotional distress she has and will continue to have as a result of the pregnancy. Her claims therefore relate not only to the tortious sexual assault (intercourse), but to her pregnancy and the birth of her child. Doe also observes that Senechal has asserted in his pleadings that another man is the child's father,[11] and has alleged as an affirmative defense that Doe's damages were "the actions of a third person over whom the Defendants did not exercise control." These pleadings lend further support to the conclusion that Senechal's condition as the father of Doe's child is "in controversy." Cf. Vargas v. Vargas, 54 A.D.2d 590 (N.Y. Sup. Ct. 1976) (claim that defendant secured plaintiff's consent to marriage by false representation he was cause of her pregnancy placed issue of paternity in controversy); State ex rel. Keithline v. Jennings, 463 P.2d 690, 692 (Okla. 1970) (order to compel blood testing appropriate where petitioner claimed defense of fraud in inducement of contract he signed for child support, but later claimed he had relied on deceit of mother).

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[11] Doe reportedly told her mother that another man, "the man on the bus," was the father of her child, while she allegedly told an investigator that she did not have sexual relations with such a man.

Doe has also satisfied her affirmative burden that there is "good cause" to compel Senechal's examination. The judge concluded that, without evidence that Senechal is the child's biological father, "there is no objective basis by which to evaluate her claim." We agree. Although there is evidence from which a jury could conclude that Senechal had the opportunity to inflict the tortious injury, Doe has no other source from which to draw her proof of improper sexual contact, other than her own testimony. Cf. Marroni v. Matey, 82 F.R.D. 371, 372 (E.D. Pa. 1979) (not good cause for examination if plaintiff could obtain information by other discovery methods that would be less intrusive on defendant's privacy interests); 8A C.A. Wright, A.R. Miller & R.L. Marcus, Federal Practice and Procedure § 2234.1 (2d ed. 1994) ("The court may decide to refuse the examination if the information sought is available from other sources"). Particularly where Senechal has denied that he ever engaged in sexual conduct with Doe, confirmation from a DNA profiling method that is recognized as a scientifically valid methodology, see Commonwealth v. Vao Sok, 425 Mass. 787, 799 (1997), would go far in assisting the trier of fact to determine Senechal's liability, as the motion judge observed.

A judge has broad discretion in determining whether to order a physical examination pursuant to rule 35. Absent an abuse of that discretion, we shall not reverse a judge's decision on that or other matters of discovery. There was none here.

3. Fourth Amendment. Senechal argues that the prohibition of the Fourth Amendment against unreasonable searches and seizures is an independent ground for quashing the judge's discovery order because he has a right to be free from "government sponsored intrusions into the integrity" of his own body.

The civil litigation here concerns private litigants, and Senechal points to no authority for his proposition that the Fourth Amendment has any application in this context. See Bowerman v. MacDonald, 431 Mich. 1, 19 (1988) (defendant did not cite and court was unaware of "any cases in which otherwise properly constituted discovery in a civil action has been held to constitute a violation of the Fourth Amendment").[12] To the contrary, in Schlagenhauf v. Holder, supra at 114, the Supreme Court made no mention of a possible Fourth Amendment constraint, holding that "Rule 35 . . . is free of constitutional difficulty."

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[12] In civil cases the constraints of the Fourth Amendment do apply to government litigants in certain circumstances, such as subpoenas duces tecum issued in the course of investigation by grand juries or administrative agencies. See, e.g., United States v. Dionisio, 410 U.S. 1, 11 (1973); See v. Seattle, 387 U.S. 541, 542-544 (1967) (city fire department inspector may not enter and inspect commercial warehouse as part of routine, periodic city-wide code-compliance canvass without warrant and without probable cause to believe violation of any municipal ordinance existed); United States v. Morton Salt Co., 338 U.S. 632, 652-653 (1950) (Fourth Amendment requires administrative agency subpoena of corporate books or records be limited, relevant, and specific). See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-614 (1989).

In any event, the physical examination ordered here -- the buccal swab paternity test -- would meet the standard of reasonableness.[13] The cells to be extracted from Senechal will provide test results that will significantly aid Doe in establishing liability, or may substantially exclude Senechal as the father of her child. In short, the "reasonable expectation is that the test results will strongly point to, but not conclusively prove" the answer to whether Senechal caused Doe's pregnancy. Matter of a Grand Jury Investigation, 427 Mass. 221, 226 (1998).

Order affirmed.

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[13] There are a scattering of reported decisions where courts have declined to decide whether the Fourth Amendment applies to civil discovery orders among private litigants, but have nevertheless considered the "reasonableness" of the discovery order. See, e.g., Bowerman v. MacDonald, 431 Mich. 1, 19 (1988). See also United States v. International Business Machs. Corp.,83 F.R.D. 97, 103 (S.D.N.Y. 1979) (assuming Fourth Amendment applies to civil discovery subpoena and applying reasonableness test); Ambassador College v. Goetzke, 244 Ga. 322, 325 (1979) (Hill, J., concurring), cert. denied, 444 U.S. 1079 (1980) (court should consider in "proper" case whether discovery is being used by civil litigants pursuing unsubstantiated claims in violation of rights protected by Fourth Amendment, and whether probable cause requirement of Fourth Amendment is applicable to civil discovery orders).

Supreme Court, U.S.
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(2)

No. 99-2034

IN THE

Supreme Court of the United States

JEFFREY SENECHAL,

Petitioner,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the March 20, 2000 interlocutory order by the Massachusetts Supreme Judicial Court is a "final judgment or decree" for purposes of 28 U.S.C.S. § 1257.

II. Whether the March 20, 2000 decision by the Massachusetts Supreme Judicial Court is based upon independent, separate, non-federal grounds thereby depriving the Supreme Court of the United States of jurisdiction.

III. Whether the Petitioner has set forth a substantial federal question given the previous decision of the Supreme Court of the United States in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964).

IV. Whether the Massachusetts Supreme Judicial Court appropriately applied the "in controversy" and "good cause" requirements of Rule 35 of the Massachusetts Rules of Civil Procedure.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Rule 10 of the Supreme Court Rules, Consideration Governing Review on Certiorari, provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a depar-

ture by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 U.S.C.S. § 1257, State Courts; Certiorari, provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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STATEMENT OF THE CASE

Petitioner, Jeffrey Senechal, (hereinafter "Senechal"), a mental health counselor, is alleged to have engaged in tortious sexual conduct impregnating Jane Doe (hereinafter "Doe"), while she was an in-patient at West Lake Academy (hereinafter "West Lake").[1] He has been ordered to undergo a physical examination pursuant to Rule 35 of the Massachusetts Rules of Civil Procedure (hereinafter "Mass. R. Civ. P. 35") in order to complete DNA testing comparison with Doe and the baby born to Doe. He contends that this order violates the Fourth Amendment to the United States Constitution and, alternatively, that Doe failed to satisfy the Rule 24 requirements of "in controversy" and "good cause".

Doe was committed to West Lake Academy, a Commonwealth of Massachusetts Department of Mental Health (hereinafter "DMH") intensive residential treatment program (hereinafter "IRTP") for mentally ill adolescents[2] operated under contract by Health & Education Services, Inc. (hereinafter "HES"). She had suffered from severe sexual and physical abuse and had been removed from the

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[1] Doe also brought claims against West Lake Academy, Health & Education Services, Inc. (a subsidiary of North East Health Systems, Inc. which owned and operated West Lake Academy), Robert Johnston, Donald Mosher and Ed Hovestadt, employees and administrators for Health & Education Services, Inc.

[2] "Mentally ill adolescent" for purposes of 104 CMR 2.14 is an adolescent whose mental illness is characterized by a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism.

custody of her mother. Defendant, Robert Johnston described her at his deposition:

> [S]he really is a severe survivor of sexual abuse. She has some pretty unsafe ideas about herself and her behavior.
>
> Abuse reactive kids tend to identify with their aggressor and produce behaviors to appease or appeal to or mimic their aggressor. It's the defensive style that some kids get into and [Doe] showed those kinds of characteristics.

One month prior to leaving the program, West Lake arranged for Doe to make weekend visits home to Maine. West Lake arranged for transportation by bus from Boston to Maine. West Lake also allowed Senechal, a mental health counselor, to transport the plaintiff, alone, to the bus station for these visits. While transporting Doe, Senechal engaged in sexual contact, including intercourse, with Doe.[3] Doe was medicated on each occasion due to her psychiatric condition.

Immediately after her transfer, West Lake discovered the sexual assault and reported it to the Department of Social Services ("DSS"). West Lake did not report the counselor's assault to local law

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[3] Petitioner previously transported Doe alone to a medical/dental visit during which he inappropriately touched her.

enforcement. DSS "screened out"[4] the report the next day without conducting any interviews or investigations. Contrary to the implication in Petitioner's statement of facts, DSS did not make any determination in response to the report. State regulations specify those situations in which the agency can "screen out" a report, including situations where DSS has no reason to suspect that the child is still at risk of ongoing abuse. When West Lake made the report, Doe had been transferred back to Maine to a less secure facility.

Shortly after being transferred to a less secure facility in Maine, Doe learned she was pregnant. Eight months later, a child was born and adopted by a third party. Doe identified Senechal as the father. She testified that he was the only man with whom she had sexual contact during the relevant time period, that is, conception.[5]

The Maine Department of Human Services reported to DMH which then investigated the matter. The investigation focused on the dates of alleged contact. At least one date, June 18, 1995, according to the DMH report, was "within reason" as a conception date given Doe's pregnancy test

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[4] "Screening out" is distinctly different from dismissal or a final determination. The various permissible responses by DSS are set forth in 110 CMR *et. seq.*

[5] Petitioner's Statement of the Case does not mention this point, nor the fact that Doe had denied to the DMH investigator that she had sexual relations with any other man, as was reportedly suggested by her mother.

result.[6] Senechal and Doe were alone at the time of conception. DMH concluded:

> With no objective, third-party or consistent evidence to serve as an intercessor, [Doe's] and Mr. Senechal's clashing testimonies make it impossible to determine beyond doubt what actually transpired on June 18.

Ultimately, while DMH could not determine beyond a "reasonable doubt" whether the assault occurred on that date, it concluded that Doe's human rights were violated and she was subjected to a potentially abusive situation. In addition, DMH recommended that:

> It would be prudent for Mr. Senechal to agree to taking part in a test that would determine whether he is the father of [Doe's] child. That test, as outlined by the investigator by the Boston University Center for Human Genetics, would involve the painless scraping away of cells from inside the cheeks....

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[6] Petitioner argued before the Supreme Judicial Court that the date of conception of the child could not be determined with certainty because Doe had not produced records in response to his discovery requests. Because he had not raised this issue in the Superior Court, the Supreme Judicial Court did not address it (A. 17a). Doe submits there was evidence of the conception date before the Superior Court which Petitioner did not challenge. He attempts to raise that same issue here (Petition, p. 23). Again this assertion is unsupported and is not properly before this Court for consideration.

Senechal refused to undergo this testing. Without this corroborating evidence, DMH was unable to say whether Senechal fathered the baby and whether he had sexually abused Doe.

Senechal testified that he recalled transporting Doe. He recalled that on one occasion he was caught in traffic and pulled over to a rest area with Doe, spending time there while waiting for traffic to clear. He also recalled that he stopped several times to do errands. Senechal neglected to tell DMH about these instances.

Senechal temporarily left HES shortly after the sexual incidents involving Doe. Shortly thereafter, he was rehired as the director of a program providing services to male and female homeless adolescents at risk, despite the outstanding allegations and the then ongoing DMH investigation. When the DMH report was subsequently issued to HES, defendant Robert Johnston, told Senechal that, if the DMH recommended test was positive for paternity it would indicate that:

> He had sex with her in all likelihood while at West Lake. She would have been a minor. That would have been statutory rape. That would have been abuse of a client and at the very least, that would mean that he would no longer remain in our employment.

Senechal responded by persisting in his refusal to participate in paternity testing and continued in his employment with HES. His refusal continues to date.

Senechal denies that he had sexual intercourse with Doe or that he is the father of the child later born to her, and has affirmatively taken the position that at least two other men might be the father of her child. He specifically acknowledges that the matter of his paternity is at issue, stating that "on the issue of liability," a Mr. Bryant, the man Doe was living with at the time of the birth of the child, "very likely" fathered the child. In a similar vein, his answer to the complaint includes, as an affirmative defense, that Doe's damages were caused by a "third person."

Senechal was asked to take a paternity test after this lawsuit was filed. He refused to do so, without explanation.

Trial has yet to be scheduled on the merits of the case which include claims by Doe against the various defendants for negligence and violation of her state and federal civil rights.

In January, 1999, Doe moved, pursuant to Mass. R. Civ. P. 35, to compel Senechal to undergo a physical examination. The scope of the physical examination was limited to a buccal swab paternity test.[7] Senechal opposed.

On May 14, 1999, the Superior Court for the Commonwealth of Massachusetts issued a Memorandum of Decision and Order on the Motion, holding that (1) the defendant's condition as father of the child was "in controversy" for purposes of Rule 35 and that "good cause" for the examination existed, as required by that Rule; and that (2) it was not clear that the request implicated the

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[7] This test involves the rubbing of a "q-tip" or swab on the interior surface of the cheek.

Fourth Amendment at all, but even if it did, the proposed test was "reasonable" within the meaning of the Fourth Amendment. It allowed Doe's motion to compel the buccal swab paternity test as described in the literature attached to that Motion.

Senechal filed a Petition under Massachusetts General Laws c. 231, § 118 in the Appeals Court for the Commonwealth, seeking interlocutory review and relief from the Superior Court order. Doe opposed the petition on the grounds that the trial court properly found that she had satisfied the requirements of Rule 35 in requesting that Senechal undergo the test, and that, even if implicated, the test did not violate the Fourth Amendment.

By Order dated June 24, 1999, a Single Justice of the Appeals Court (Lenk, J.) denied Senechal's petition for interlocutory relief, but permitted him to take an interlocutory appeal to the full panel. Pursuant to Rule 11 of Massachusetts Rules of Appellate Procedure, Doe requested direct appellate review by the Supreme Judicial Court. The Massachusetts Supreme Judicial Court allowed that request.

On March 20, 2000, the Massachusetts Supreme Judicial Court unanimously affirmed the Superior Court order allowing the Rule 35 physical examination of Senechal for the purpose of completing a buccal swab paternity test. It held that the motion judge had properly concluded that Doe made the necessary showing under Rule 35 that Senechal's condition as the putative father of her child was "in controversy" and that

there existed "good cause" to compel the examination. (A. 19a-22a). The Supreme Judicial Court noted that the trial judge had broad discretion in determining whether to order a physical examination pursuant to Rule 35, and there had been no abuse of that discretion. (A. 22a). As for the Fourth Amendment, the Supreme Judicial Court stated that Senechal had not provided any authority for his proposition that it applied in this context to civil litigation concerning private litigants and specifically cited the holding in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 114 (1964) that "Rule 35... is free of constitutional difficulty." (A. 23a). The Court held that, even if the Fourth Amendment were to apply, the physical examination ordered, the buccal paternity test, would meet the standard of reasonableness. (A. 24a).

Senechal filed this petition to obtain review of the decision of the Supreme Judicial Court affirming the order allowing Doe's motion to compel a buccal swab paternity test.

REASONS FOR DENYING THE WRIT

I. No Compelling Reason Exists Warranting This Court's Review On Writ Of Certiorari.

Review on a writ of certiorari is a matter of judicial discretion. It will be granted only when "compelling reasons" exist. The "compelling reasons" for review of a state court decision exist where (1) a state court of last resort has decided an important federal question in a way that con-

flicts with the decision of another state court of last resort or of a United States court of appeals; or (2) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court. U.S. Sup. Ct. R. 10. No such compelling reasons exist in this case. The Supreme Judicial Court upheld the trial court's discovery order upon application of state law and the Massachusetts Rules of Civil Procedure. No conflict among the state or federal circuits is presented. The Petition should be denied.

II. There Is No "Final Judgment Or Decree" Sufficient To Trigger This Court's Certiorari Jurisdiction.

The jurisdiction of this Court, under 28 U.S.C. § 1257, to review a decision of a state court depends upon the existence of a final judgment or decree by the state court. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-477 (1975). This finality requirement is designed to (1) avoid piecemeal review of state decisions, (2) avoid the rendering of advisory opinions in cases where there may be no real case or controversy, and (3) assure that this Court does not unnecessarily intrude into state affairs. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973), citing *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).

A state court judgment or decree is only final for purposes of review by this Court if (1) it is subject to no further review or correction in any other state tribunal, and (2) it is effective determination of litigation and not merely interlocutory or an intermediate step therein. *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U.S. 548, 551, *reh'g denied*, 324 U.S. 890 (1945). This Court has also found "finality" in a small class of cases where there has been (1) a final assertion of jurisdiction, with no further review of that issue possible in state courts; (2) a threat of serious erosion of national policy, and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945) (conflict between courts of two different governments); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) (appropriate venue to entertain action against national bank); *Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) (jurisdiction of state court to issue injunction in unfair labor practices case); and, *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1, 7 (1965) (issue of personal jurisdiction anterior to and separable from merits) and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)(determination of federal issue by the Supreme Court will terminate the litigation).

The subject of this Petition is an interlocutory, intermediate discovery order involving application of a state procedural rule in a civil case. Review of such intermediate rulings is allowed only in ex-

ceptional circumstances. Indeed, even if a federal issue is finally decided on an interlocutory appeal in the state courts, it does not necessarily qualify for immediate review. *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Only where there is real danger present of some irreparable injury to important constitutional concerns or federal policies, such as occurred in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), will there be exceptional circumstances warranting review. There is no such "real danger" presented in this case and review of the intermediate state court order is not warranted.

Rather, where definitive disposition has not been made of all the legal and factual issues in this case, the exercise of this Court's certiorari jurisdiction would necessitate a piecemeal review of, and interference with, ongoing state litigation. Furthermore, the order in this case is enmeshed in the particular factual issues presented, and it affects only these litigants in the present case. A determination of "good cause" and "in controversy" as required by Mass. R. Civ. P. 35 necessarily requires an examination of and reliance upon factual issues. Dispositive motions have not been heard and trial has not taken place. The interlocutory order at issue resolves only one discovery issue as to only one defendant.

Moreover, jurisdiction does not lie where the "remaining litigation may raise other federal questions." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 127, *North Dakota State Board of Phar-*

macy v. *Snyder's Drug Stores, Inc.*, 414 U.S. at 163. There are additional claims against all of the defendants, including violation of Doe's federal civil rights. The ongoing litigation may entail further appellate review, including appellate review of federal constitutional issues. The alleged constitutional issues should not be addressed until the trial court's proceedings are finally concluded, the record complete, and the state appellate courts have completed their review of the trial court record. *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 127 (1981).

This Court dismissed a writ of certiorari as improvidently granted for want of jurisdiction in a similar procedural scenario in *Jefferson* v. *City of Tarrant*, 118 S.Ct. 481 (1997). In that case, the state's highest court answered a single certified question that affected only two of four counts in the complaint. The case lacked the finality required for review by this Court.

The possibility that matters left open may generate additional constitutional questions requires a finding that finality does not exist and that the matter is not ripe for review. *See generally Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 72 (1948) (finality requirement not met merely because major issues have been decided by highest state court). So, too, where the order at issue is enmeshed in the factual controversies of the case and the factual record is not complete, review is not appropriate. *Jefferson* v. *City of Tarrant*, 118 S.Ct. at 486 (1997). To accept certiorari at this stage of the litigation will only create the risk that subsequent state proceedings may generate addi-

tional federal questions, requiring piecemeal federal review, and potentially interfering with the ability to review related federal questions arising out of a single case. It will serve to delay justice and cause economic waste. *Radio Station WOW* v. *Johnson*, 326 U.S. at 124.

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 124. Where that requirement has not been met, the Petition for Writ of Certiorari should be denied.

III. The State Court Decision Is Based Upon Adequate And Independent Non-Federal Grounds And Therefore There Is No Jurisdiction.

The Petitioner implies that the Fourth Amendment argument was his primary argument before the Supreme Judicial Court in opposition to the Rule 35 examination and that the Fourth Amendment analysis was the first prong of that Court's decision. This impression is erroneous. Petitioner's "first" argument to the Supreme Judicial Court was that the trial judge had abused his discretion by ordering a physical examination under Mass. R. Civ. P. 35. (A. 17a). That rule of civil procedure in state court cases permits a judge to order any party to submit to a physical examination by physician only if his physical condition is "in controversy" and if the

moving party has established "good cause" for the test to proceed. Following an analysis of Mass. R. Civ. P. 35 and its application to the facts submitted to the Superior Court, the Supreme Judicial Court held that the Superior Court judge had not abused the broad discretion accorded him in discovery matters in ordering the test. This holding was the primary basis for the Supreme Judicial Court's decision, not any Fourth Amendment analysis.

Where a decision rests on adequate state law grounds, review on certiorari is not warranted. *See, e.g.*, R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, 141 (7th ed. 1993) (if state court judgment rests on state law grounds, the Supreme Court may have no jurisdiction to review a case; any ruling on the federal question becomes superfluous and incapable of triggering Supreme Court jurisdiction; "[T]he ruling as to the state issue necessarily reduces the case to the vast field of garden variety state court judgments, dealing with state law only.").

In order to determine precisely the ground on which the judgment rests, two questions must be answered: (1) Is the judgment based upon a state ground that is independent and free of entanglement with the federal question? (2) Is that state ground adequate to support the judgment? If, as here, both questions are answered in the affirmative, this Court's jurisdiction fails. Where the state court decision indicates clearly that it is based upon a bona fide separate, adequate and independent state ground, the Supreme Court

will not undertake review. *Michigan* v. *Long*, 463 U.S. 1032 (1983).

The Supreme Judicial Court's decision is based upon the state court rule of civil procedure which is independent and free of entanglement with the Petitioner's federal question, and the state grounds upon which the decision is based is adequate to support the order issued. The Supreme Judicial Court clearly addressed the independent state basis for its decision, after its recitation of facts in the first section of its decision. The Court concluded that the Superior Court judge had not abused his discretion in ordering the Petitioner to undergo a physical examination under Mass. R. Civ. P. 35. Only *after* reaching this conclusion on independent state grounds, Mass. R. Civ. P. 35, did the Court turn to the Petitioner's allegation that the examination was prohibited by the Fourth Amendment. Reliance by the Court on the application of state law was clearly independent and separable from any discussion of the Fourth Amendment.

Moreover, contrary to Petitioner's assertion otherwise in the Petition (at p. 6), the Supreme Judicial Court did not hold, as a matter of law, that the Fourth Amendment did not apply to civil actions between private litigants. Rather, it stated that "[t]he civil litigation here concerns private litigants, and Senechal [the Petitioner] points to no authority for his proposition that the Fourth Amendment had any application in this context." (A. 23a). His argument to the Court, therefore,

was without support.[8] The Supreme Judicial Court did note, as an aside, that this Court, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 114 (1964), had held that the analogous Federal Rule of Civil Procedure Rule 35 was "free of constitutional difficulty." (A. 23a). It further stated that, "in any event," the examination here "would meet the standard of reasonableness." (A. 24a). In so stating, it referenced in a footnote "a scattering of reported decisions where courts have declined to decide whether the Fourth Amendment applies to civil discovery orders among private litigants, but have nevertheless considered the 'reasonableness' of the discovery order." (A. 24a and cases cited).

Where the decision clearly rested on the application of Mass. R. Civ. P. 35 to a particular examination in a particular case, and not on any Fourth Amendment analysis, this Court's review is unwarranted. The Petition should therefore be denied on this basis.

IV. There Exists No Substantial Federal Question And Therefore The Petition Should Be Denied.

The question whether an order to undergo physical examination to obtain a DNA sample under Mass. R. Civ. P. 35 violates the Petitioner's right to privacy under the Fourth Amendment, has been explicitly foreclosed by the prior decision of this Court in *Schlagenhauf* v. *Holder*, 379

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[8] It still is. Petitioner has provided no cases demonstrating that the Fourth Amendment even applies in this context.

U.S. 104 (1964). The federal issue is, therefore, insubstantial, and the petition for review by this Court should be denied. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902); *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Palmer Oil Corp.* v. *Amerada Corp.*, 343 U.S. 390, 391 (1952).

In *Schlagenhauf*, this Court was asked to review a federal court's application of the "in controversy" and "good cause" requirements of Federal Rule of Civil Procedure 35. The co-defendants' answer alleged that the petitioner was negligent in that he was unfit medically and psychiatrically to operate a tractor trailer. The co-defendants sought an order allowing both mental and physical examinations by one specialist in each of the following fields: internal medicine (necessarily involving a touching of and testing of the physical person), ophthalmology; neurology and psychiatry.[9] The petitioner in that case argued that he was a defendant, that his physical and mental condition was not in controversy, and that application of Rule 35 to him, as a defendant, would be an unconstitutional invasion of his privacy. So, too, Petitioner here argues that

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[9] Petitioner minimizes the breadth and scope of the examinations in *Schlagenhauf*, claiming that the testing was "standard" in comparison with the swabbing of the inside of his cheek with a q-tip. He now asks that this Court essentially reverse *Schlagenhauf* because the specific test which he has been ordered to undergo is "new" and was unforeseen by this Court at the time of the *Schlagenhauf* ruling. The *Schlagenhauf* decision, however, did not limit its ruling to only certain types of mental and physical tests or to only those tests available or knowable by this Court in 1964. Certainly, blood tests and cultures as part of an internal medicine exam were contemplated in 1964. Petitioner is unable to distinguish those from the q-tip swabbing of the inside of his cheek.

the Rule 35 examination of him, an unwilling defendant, is an unconstitutional invasion of his privacy. The *Schlagenhauf* court noted its earlier decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) wherein they held that "Rule 35 could not be assailed on constitutional grounds". The Court, in *Schlagenhauf*, reiterated that:

> Rule 35, as applied to either plaintiffs or defendants to an action, is free of constitutional difficulty and is within the scope of the Enabling Act. We therefore agree with the Court of Appeals that the District court had power to apply Rule 35 to a party defendant in an appropriate case.

Id. at 240.

Schlagenhauf thus disposes of any argument by Petitioner that, as a defendant, he cannot be compelled to submit to a physical examination, and that Rule 35 can only be invoked against plaintiffs. *Id.* at 240 ("[i]ssues cannot be resolved by a doctrine of favoring one class of litigants over another"). The *Schlagenhauf* Court accepted the petition in order to set guidelines for application of F.R.C.P. 35 to particular cases. The Court noted that discovery rules are to be accorded a broad and liberal treatment to effectuate their purpose; that "civil trials in the federal courts no longer need be carried on in the dark," citing *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). The Petitioner here argues for darkness.

Petitioner argues that to submit to such an examination is to allow an invasion of his person and that the threatened dissemination of results of that examination further aggravates the violation of his right to privacy. He seems to argue that under no circumstance may a defendant be compelled to undergo a physical examination during which his physical being is touched or through which a diagnosis of any condition may be made. These arguments have all been rejected by this Court.

The *Schlagenhauf* Court was careful to note that any claimed error in the application of the guidelines for Rule 35 to a particular case, once set, would not automatically be grounds for review. The Massachusetts Rule of Civil Procedure is almost identical to that of the federal civil rule. It requires that the judge determine that the mental or physical condition is "in controversy" and that there be "good cause" for the requested examination. The Supreme Judicial Court relied upon *Schlagenhauf*, by analogy, in analyzing and applying the requirements of the state procedural rule.

To the extent that Petitioner now asks this Court to review the Supreme Judicial Court's analysis and conclusion that the requirements of Rule 35 were satisfied in this case or that its analysis of "reasonableness" was faulty, such request is clearly not one warranting review on certiorari. The resolution of that issue implicates issues important only to this case and its parties. Certiorari typically only is granted in cases involving principles which are important to the public

as distinguished from the parties. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule. U.S. Sup. Ct. Rule 10. In any event, the state court properly found that the requirements of Rule 35 were met.

V. The Massachusetts Supreme Judicial Court Properly Affirmed The Order That Petitioner Undergo The Physical Examination.

1. The Court Properly Determined That The "In Controversy" And "Good Cause" Requirements Of Rule 35 Were Satisfied.

Doe alleges that Petitioner engaged in tortious sexual conduct with her claiming assault and battery against him. In support of her Rule 35 motion, Doe produced testimony that the Petitioner was the only person with whom she was sexually involved at the relevant time. In addition, there was evidence developed by DMH that, during the relevant time for conception, the Petitioner, improperly, had been alone with Doe during transport to the bus station and on a medical visit. Shortly thereafter, Doe learned she was pregnant. Petitioner denies any sexual contact with Doe, and denies paternity of the child.

Doe claims damages as the result of the sexual assault, the resulting physical injury, the pregnancy, and the permanent emotional distress she has and will continue to sustain. Thus, her claims relate not only to the sexual intercourse and the physical assault, but also to her pregnancy and the birth of the child fathered by Petitioner. The Petitioner's physical examination, therefore, bears substantially not only on the assault claims but on the claims for damages. The Supreme Judicial Court properly concluded that, given these circumstances, Doe met her burden of demonstrating that the Petitioner's condition was "in controversy," one prong of the required showing for a Rule 35 examination. (A. 19a).

Apart from Doe's affirmative showing of the "in controversy" requirement on the unique facts of this case and Petitioner's denial of each claim, the record reflects instances of affirmative conduct on Senechal's part by which *he* has placed his paternity status "in controversy":

1. He has asserted in pleadings that another man is the child's father. In so doing, he specifically acknowledges that the matter of his paternity is at issue, stating that "on the issue of liability," a Mr. Bryant "very likely" fathered the child. In a similar vein, his answer to the complaint includes, as an affirmative defense, that the plaintiff's damages were caused by a "third person." *See Schlagenhauf, supra* (matter may be placed in controversy by defense);

2. Petitioner has refused the recommendation of DMH to submit voluntarily to testing; and

3. Petitioner attacks Doe's allegations as being "uncorroborated," and "unsubstantiated" and claims that paternity is solely a credibility issue.[10] But this line of argument only further evidences that his paternity status is "in controversy," and further supports the judge's decision to compel the buccal swab test for comparison testing. The Supreme Judicial Court noted that if Doe can demonstrate through reliable evidence that Petitioner is the father of the child, conceived while she was under his supervision, she would prove that an intentional touching had taken place, one of the elements of assault and battery. Such a test would provide an objective basis by which to evaluate the claim. Petitioner taunts Doe with her inability to corroborate her allegation of assault and yet pleads with this Court to protect him from that effort to corroborate her allegations.[11] The Petitioner's condition clearly is "in controversy."

The Supreme Judicial Court properly ruled that there is "good cause" to compel Petitioner to undergo the buccal swab test noting that confirmation from a DNA profiling method that is recognized as scientifically valid methodology (citing

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[10] It also bears noting that Petitioner's refusal to acknowledge paternity or to undergo paternity testing has benefitted both himself and his former employer, a codefendant. If Petitioner is determined to be the father of the plaintiff's child, then HES and the various supervisory employees responsible for the plaintiff's care, can no longer point to the plaintiff's tortured past as an explanation for her allegations.

[11] The requested examination will also presumably corroborate Senechal's denial of the physical assault.

Commonwealth v. *Vao Sok*, 425 Mass. 787 (1997)) would go far in assisting the trier of fact to determine Petitioner's liability. "The results of such a test cannot be viewed as collateral."[12] (A. 21a).

Contrary to Petitioner's argument, he has not been ordered to undergo "DNA testing", testing that would reveal a significant amount of genetic identity information and "all of the information unique to the creation of an individual", him. He has been ordered to undergo one test using DNA analysis to answer one question; whether he is the father of the child born to Doe. This very limited, discrete test, the buccal swab test, at issue is not the broad sweeping DNA testing described in Petitioner's submission. A challenge to such hypothetical testing does not present a justiciable case or controversy. Petitioner's hysteria is ill-placed. He ignores the availability of confidentiality agreements and orders of impoundment common to protecting sensitive privileged information in civil cases. He did not request that the Superior Court alternatively protect him from disclosure of the results of the test nor did he request similar relief from the Supreme Judicial Court. His concern regarding disclosure is new founded

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[12] Defendant argues that results of paternity tests are not in and of themselves evidence of intercourse nor conclusive of paternity, citing *Commonwealth* v. *Beausoleil*, 397 Mass. 206 (1986). *Beausoleil* is not a DNA testing case, but a blood grouping case. Since 1986, there have been many cases in which DNA testing has been discussed and endorsed as being so scientifically reliable that it can alone prove or disprove criminal liability in some cases. See *GEB* v. *SRW*, 422 Mass. 158 (1996) (genetic marker tests showed 99.8 % probability of paternity). Indeed, the scientific value of the collection and analysis of DNA is not questioned. *Commonwealth* v. *Vao Sok*, 425 Mass. 787 (1997).

and easily resolved by a variety of means available to civil litigants.

The case which Petitioner describes as "most factually similar to the present case," *State ex rel. C.S.* v. *Dowd*, 923 S.W.2d 444 (Mo.App.E.D. 1996), is inapposite. In *Dowd*, the court acknowledged that its decision would be otherwise if it was dealing with a request for a test matching DNA or fingerprints to evidence found at the scene which would identify the perpetrator. A positive paternity test establishing that the Petitioner is the father of the child, would be the equivalent of a fingerprint left at the scene indicating he was involved in wrongdoing as to Doe, a mentally ill person placed in his care.

Here, Doe asked for a non-invasive, painless physical exam that will result in a finding of accuracy in excess of 99% in identifying Petitioner as the person who assaulted her, impregnated her and left her with child. The impregnation of the plaintiff is a central issue of the case. Thus, contrary to Petitioner's assertion, the issue is not one solely of credibility.

2. The Court Properly Determined That The Paternity Testing Would Meet the Standard of Reasonableness.

The Supreme Judicial Court noted Petitioner's failure to provide authority for the proposition that the Fourth Amendment was implicated in this case. However, the court noted that even if the Fourth Amendment was implicated somehow,

the required Rule 35 test met the standard of "reasonableness."

In *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) the Supreme Court stated that neither the existence of "probable cause" nor "individualized suspicion" was an absolute prerequisite to the conclusion that a test would be "reasonable" under the Fourth Amendment. *Id.* at 619-620, 624. Nonetheless, here, Doe established such cause by virtue of (1) her deposition testimony that she bore a child, (2) the fact that the Petitioner was the only person with whom she had intercourse during the period when the child was conceived, and (3) the DMH report which isolated one potential date during which both were together for an unspecified time, and identified that date as a possible date of conception given medical testing. That report recommended the buccal swab test.

In *Schmerber* v. *California*, 384 U.S. 757 (1966) this Court examined the "reasonableness" standard in the context of a criminal search and seizure case. The Court noted: "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner". *Id.* at 768. On the issue of reasonableness, this Court noted that blood tests are "commonplace" in periodic physical examinations, involve a minimal extraction of blood and cause virtually no risk trauma or pain. The *Skinner* Court, citing *Schmerber* v. *California*, 384 U.S. at 771, determined that blood tests do not constitute an un-

duly extensive imposition on an individual's privacy and bodily integrity. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. at 625. The Petitioner has not even been ordered to submit to a blood test but rather a "q-tip" swabbing of the inside of his cheek.

The Supreme Judicial Court followed the same analysis on this issue as the Michigan Supreme Court in *Bowerman* v. *MacDonald*, 427 N.W.2d 477 (Mich. 1988). In that case the court found that a mother's statement that a putative father was the father of her child, along with testimony that they had engaged in intercourse, was enough to constitute probable cause for Fourth Amendment purposes, to whatever extent that Amendment was implicated. The court determined that to the extent there could be a "search", the blood test was a reasonable one for Fourth Amendment purposes. The court determined that the plaintiff's verified statement clearly placed the matter "in controversy" and provided "good cause" for the motion. *Id.* at 485. *See generally* M.G.L. c. 209C, § 17 (establishing sufficiency of affidavit testimony from mother that sexual intercourse occurred between her and putative father during probable period of conception in order to order blood test or HLA test).The same holds true here. However, Doe offered more than her own sworn testimony. The DMH report constituted an investigation by impartial fact finders who interviewed individuals and, on the basis of their investigation, determined that there was good reason to request that the Petitioner submit to the buccal swab test.

Although Petitioner suggests that the holding in *United States* v. *International Business Machines Corp.*, 83 F.R.D. 97 (S.D.N.Y. 1979), is supportive of his argument, that court held that it strained common sense and constitutional analysis to conclude that the Fourth Amendment was meant to protect against unreasonable discovery demands made by private litigants in the course of civil discovery. The court noted that protection from unduly burdensome or troublesome discovery rests in the rules of civil procedure not the Fourth Amendment.

Petitioner also suggests, for the first time in his petition, that there are actually two searches involved; one the taking of the epithelial cells from inside his cheek, and the other when the actual analysis of data takes place. While an interesting concept, it does not require a different analysis than that set forth set forth in the Supreme Judicial Court's decision.

Petitioner finds fault with the Supreme Judicial Court for failing to identify a governmental interest for ordering the test. The Supreme Judicial Court set forth a complete analysis establishing satisfaction of the Mass. R. Civ. P. 35 requirements. Petitioner appears to be suggesting that every time a Rule 35 exam of a plaintiff or defendant is ordered, or that discovery of privileged materials is sought, a civil court must first identify a legitimate governmental interest at stake. Such a finding would require a sweeping, comprehensive change in the implementation of civil rules of procedure in both state and federal courts.

The court's interest in the truth seeking process is apparently too abstract according to Petitioner. It was not too abstract for the dissenting justices in *Union Pacific Co.* v. *Botsford*, 141 U.S. 250 (1891). In that case, cited by the Petitioner, a female plaintiff objected to a physical examination requested by the defendant. The federal rules of civil procedure were not in place and the court refused to order the examination. The dissenters however noted:

> We believe that trust and justice are more sacred than any personal consideration, and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

Id. at 259.

It is the court, or jury which has to decide the plaintiff's claims against the Petitioner. *See generally Sudwischer* v. *Hoffpauir*, 589 So.2d 474, 476-477 (La. 1991) (Lemmon, J., concurring), cert. denied sub nom, *Estate of Hoffpauir* v. *Sudwischer*, 112 S.Ct. 1937 (1992) (general rules of discovery, and not statute, applied to illegitimate daughter's request for blood sample of siblings in filiation matter and "fundamental fairness prohibits her from keeping this possibly relevant evidence from the court which is to decide plain-

tiff's claim that has been supported by a prima facie showing of filiation.") The intrusion of the buccal swab test upon the Petitioner's physical integrity or privacy is minimal. The Mass. R. Civ. P. 35 requirements satisfy any "reasonableness" standard under the Fourth Amendment.

VI. As A Matter Of Policy, The Testing Of Petitioner Is Proper.

Petitioner complains that his "private" DNA cannot be obtained to undermine his credibility because such a test is not "traditional".[13] Instead, Petitioner argues, to preserve the dignity of privacy rights, "[t]he plaintiff must resort to traditional means to seek to attack defendants' credibility or to seek to bolster her own". It does not stand to reason that Petitioner is able to impose on Doe's constitutionally protected privacy rights and obtain a decade's worth of mental health records in an effort to undermine her credibility with collateral, if not remote, evidence while denying Doe access to a swabbing of the inside of his cheek to obtain highly probative, scientifically reliable, and materially significant evidence, because the former tactic is "traditional" but the latter is not. The proposed testing is considered a "validated technology" in Massachusetts and across the country. *See Landry* v. *Attorney General*, 429 Mass. 336, 350 (1999). There exists no reason why Doe should have to forego the use of

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[13] As discussed *supra*, the DNA evidence in fact goes to much more than an issue of credibility.

this valuable tool or why the trier of fact should be deprived of this very useful evidence.

In addition, here, the alleged tortious conduct affected a mental health patient in a court-ordered setting, operated by a state contractor, a matter clearly of governmental interest. It was the court who committed the plaintiff to this DMH treatment facility where the conduct occurred. The state, and society as a whole, clearly have an interest in protecting those most vulnerable, whose care is entrusted to them.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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